Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte DICK A. WISE

Appeal No. 2000-1457
Application No. 08/739,888

ON BRIEF

Before ABRAMS, NASE, and JENNIFER D. BAHR, Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 to 9, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a shower curtain rod. A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Goché	2,778,030	Jan. 22, 1957
Glutting, Sr.	3,107,361	Oct. 22, 1963
Perrotta	5,103,531	Apr. 14, 1992

Claims 1 to 9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Perrotta in view of Goché and Glutting, Sr.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the answer (Paper No. 18, mailed July 14, 1999) for the examiner's complete reasoning in support of the rejection, and to the brief (Paper No. 17,

filed June 7, 1999) and reply brief (Paper No. 19, filed August 19, 1999) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 1 to 9 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the

relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Claim 1 (the only independent claim on appeal) reads as follows:

> A shower curtain rod for hanging and supporting the weight of a shower curtain and comprising an elongate rod having first and second spaced end portions defining an angle therebetween, wherein said end portions are fixed in location above a bath tub by end receiving fittings, and wherein said rod defines one smooth continuous curve between said end portions, and said fittings are supported on a pair of parallel walls located at opposite ends of said bath tub, and said fittings comprise:
> (a) a back plate attached to said wall;
> (b) a protruding rod connector with a major axis, wherein said connector is a protruding hollow cylinder to fit around said rod and is slidingly adjustable with the rod; and
> (c) said major axis of said protruding rod connector is horizontal and is angled with respect to said wall to form an angle with an opposed rod connector that is the same as the angle between the end portion of the rod; wherein said fittings
> (d) support said rod elevated above the bath tub at a height and in a horizontal plane to define a shower enclosure; and said shower curtain rod has said two end portions and a curving portion conforming to a portion of the curvature of the bath tub therebelow to enable a curtain hanging from the rod to drape into the tub.

The appellants argue that the applied prior art does not suggest the claimed subject matter. We agree.

All the claims under appeal require a rod to have one smooth continuous curve between first and second end portions received and fixed in fittings supported on a pair of parallel walls located at opposite ends of a bath tub. However, these limitations are not suggested by the applied prior art. In that regard, while Perrotta does teach a curved shower curtain bar 12 mounted by end supports (see, for example Figure 2), Perrotta does not teach or suggest using a curved shower curtain bar mounted by end supports onto a pair of parallel walls located at opposite ends of a bath tub. In fact, Perrotta teaches in Figure 3 a straight shower curtain bar 12 mounted by end supports onto a pair of parallel walls located at opposite ends of a bath tub. Glutting, Sr. also teaches in Figure 1 a straight shower curtain rod 4 mounted by end supports onto a pair of parallel walls located at opposite ends of a bath tub. Goché teaches in Figures 1-2 a shower curtain rod 25 mounted by end supports onto a pair of parallel walls located at opposite ends of a bath tub. Goché's shower

curtain rod 25 clearly is not one smooth continuous curve between first and second end portions received and fixed in fittings. To supply these omissions in the teachings of the applied prior art, the examiner made determinations (answer, pages 4-6) that these differences would have been obvious to an artisan. However, these determinations have not been supported by any evidence that would have led an artisan to arrive at the claimed invention.

In our view, the only suggestion for modifying Perrotta in the manner proposed by the examiner to meet the above-noted limitations stems from hindsight knowledge derived from the appellant's own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). It follows that we cannot sustain the examiner's rejections of claims 1 to 9.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 to 9 under 35 U.S.C. § 103 is reversed.

REVERSED

NEAL E. ABRAMS Administrative Patent Judge	)	
JEFFREY V. NASE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JENNIFER D. BAHR Administrative Patent Judge	)	

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